

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74 - 2067

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JEROME J. WELLS,
EDWARD A. SWEETSER,
FRANCES M. BARBEAU,
WALTER HOLMES, CONRAD
MOORE, DAVID N.
O'CONNELL, LAURA MAY
NOYES, RONALD MILES
MAGONI, SHIRLEY A.
MARSH, ROBERT LEE BOOTH,
RAYMOND CHESTER LUCAS, JR.,
Appellants

v.

JAMES E. MALLOY,
Commissioner of Motor
Vehicles of the State
of Vermont,
Appellee

On Appeal from the United States District Court
from the District of Vermont

APPENDIX OF APPELLANTS

Roger E. Kohn, Esquire
P.O. Box 136
Hinesburg, Vermont 05461
Counsel for Appellant
Jerome Wells

Michael J. Hertz, Esquire
Vermont Legal Aid, Inc.
3 Summer Street
Springfield, Vermont 05156
Counsel for all other
Appellants

PAGINATION AS IN ORIGINAL COPY

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CIVIL DOCKET

ED STATES DISTRICT COURT

Civ. 73-30

COFFRIN

Jury demand date:

No. 106 Rev.

[illegible]

TE 3	PROCEEDINGS	Date Order Judgment N
30	Filed Motion for leave to proceed in Forma Pauperis and Affidavit in Support of Motion to proceed in Forma Pauperis.	1.
"	Filed Order that Plaintiff may file and the Clerk shall accept said Complaint without prepayment of the required fee and Plaintiff shall not be required to pay the Marshal's fees for service. Mailed copy to Plaintiff's attorney.	2.
"	Filed Complaint.	3.
"	Issued Summons.	
31	Filed Motion for Temporary Restraining Order.	4.
"	" Stipulation.	5.
1	Filed summons returned served.	6.
6	Issued Temporary Restraining Order and delivered same to Marshal for Service.	
8	Filed notice of appearance of Villa & Kohn, Esqs. for plaintiff.	7.
"	" Temporary Restraining Order.	8.
8	Filed Defendant's answer	9.
"	Filed Stipulation.	10.
15	Filed Motion of Edward A. Sweetser to intervene.	11.
19	Filed Motion of Frances M. Barbeau to intervene.	12.
20	" Deft's Answer to Intervenor's Complaint.	13.
23	Filed Stipulation.	14.
"	" Stipulation.	15.
30	Filed Order allowing Frances Barbeau to intervene.	16.
"	Filed Complaint of Frances Barbeau.	17.
"	Filed Motion for Temporary Restraining Order as to Frances Barbeau.	18.
"	Issued Temporary Restraining Order as to Frances Barbeau and delivered same to Marshal for service.	
"	Filed Order allowing intervention of Edward A. Sweetser.	19.
"	Filed Intervenor's Complaint of Edward A. Sweetser.	20.
"	Filed Motion for Temporary Restraining Order of Edward A. Sweetser.	21.
"	Issued Temporary Restraining Order of Edward A. Sweetser and delivered same to Marshal for service.	
6	Filed TRO with Marshal's return of service as to Edward A. Sweetser.	22.
"	" " " " " " " " Frances Barbeau.	23.
20	Filed motion of David N. O'Connell to intervene.	24.
"	" " " for TRO	25.
25	Filed Stipulation.	26.
7	Filed Order granting Pltf. O'Connell's motion to intervene. Mailed copy to attorneys.	27.
"	" Intervenor's Complaint.	28.
11	Issued Temporary Restraining Order and delivered same to Marshal for service. Mailed copy to Intervenor's Attorney, James R. Flett, Esq.	
15	Filed TRO with Marshal's return of service as to David N. O'Connell.	29.
5	" Motion of Conrad Moore to Intervene as pltf.	30.
"	" Intervenor's Motion for TRO.	31.
12	" Stipulation re Intervenor Conrad Moore.	32.
18	Filed Order--granting Conrad Moore's Motion to Intervene as Plaintiff Copy mailed to Attorneys.	33.
"	Filed Intervenor Moore's Complaint.	34.
"	Issued TRO and delivered same to Marshal as to Conrad Moore. Copy mailed to Intervenor Moore's Attorney.	
19	Filed TRO returned served. (as to Conrad Moore)	35.
13	" Motion of Walter Holmes to Intervene as Party Pltf.	36.
"	" Motion of Intervening Pltf. for Temporary Restraining Order.	37.
"	Filed stipulation regarding intervening pltf. Holmes.	38.

Jerome J. Wells, On his own behalf, etc. et.al vs. James E. Malloy, etc.

Rev. Civil Docket Continuation

	PROCEEDINGS	Date Order Judgment No
27	Filed Order granting Motion of Walter Holmes to intervene as party Plaintiff. Copy mailed to attys of record and deft.	39.
"	Filed Complaint of Intervening Plaintiff, Walter Holmes.	40.
"	Issued TRO and delivered same to Marshal for service.	
7	Filed Summons of Intervening Pltf. Holmes returned served.	41.
6	Filed Plaintiffs' memorandum of law on his request for a three-judge Court.	42.
	In Chambers, hearing on Plaintiffs' request for three-judge court. Roger Kohn, Esq. and Kathleen Mitchell, Esq. for Plaintiffs; William Wuester, Esq. for Defendant.	
	Ordered: that defendant file a memorandum by the end of this week(3/2/74); plaintiffs have additional week to file reply memorandum.	
	Statements made to Court by Mr. Kohn, followed by Mr. Wuester. Decision reserved.	
5	Filed Deft's. Memorandum of Law.	43.
13	" Motion of Laura May Noyes to Intervene as Party Pltf.	44.
"	" Stipulation--consenting to intervention of Laura May Noyes, to restoring Pltf's right to operate motor vehicle, until further order of Court.	45.
"	" Stipulation--consenting to intervention of Ronald Miles Magoni, to restoring Pltf's right to operate motor vehicle, until further order of Court.	46.
15	" Order granting Laura May Noyes to intervene as party pltf. Mailed copy to attorneys.	47.
"	" Motion for Temporary Restraining Order.	48.
18	" Complaint of Intervening Pltf, Laura May Noyes.	49.
"	Issued Summons of Intervening Pltf. Noyes.	
"	" Temporary Restraining Order and delivered same to Marshal for service. Mailed copy to Zander Rubin, Esq. and Richard M. Fimm, Esq.	
19	Filed Summons and Temporary Restraining Order returned unserved.	50.
22	" Motion of Ronald Miles Magoni to intervene as party plaintiff.	51.
"	" " for TRO.	52.
25	" Pltfs' Memorandum of Law re 28 USC § 1341, Exhaustion and Abstention.	53.
26	Filed Motion of Robert Lee Booth to Intervene as Party Plaintiff.	54.
"	Filed Stipulation.	55.
"	Filed Motion of Shirley A. Marsh to Intervene as Party Plaintiff.	56.
"	Filed Stipulation.	57.
1	Filed Order granting Robert Lee Booth to intervene as party plff.	58.
1	" " Shirley A. Marsh " " " " "	59.
3	" Complaint of intervening plaintiff, Robert Lee Booth.	60.
"	" Motion for TRO.	61.
"	" Complaint of intervening plaintiff, Shirley A. Marsh.	62.
"	" Motion for TRO.	63.
5	" Pltf-Intervenor Booth's Temporary Restraining Order.	64.
"	" Pltf-Intervenor Marsh's Temporary Restraining Order. Mailed two copies of each of tro to Zander Rubin 4-8-74.	65.
6	Filed Stipulation re intervention of Zander B. Rubin.	66.
"	Filed Motion of Raymond Chester Lucas, Jr. to Intervene as Party Plaintiff.	67.
"	Filed Intervening Pltf. Lucas's Motion for Temporary Restraining Order.	68.

TE 74	PROCEEDINGS	Date Ord Judgment
7	Filed Plaintiff Intervenor Lucas' Temporary Restraining Order.	69.
"	" Order granting motion of Raymond Chester Lucas, Jr., to intervene as party plaintiff. Copy mailed to attys.	70.
"	" Complaint of Intervening Plaintiff, Raymond Chester Lucas, Jr.	71.
1	Filed Opinion and Order - - The motion of defendant Malloy is granted and the plaintiff's complaint and those of the intervenors are hereby dismissed and the Temporary Restraining Orders are hereby dissolved. Copy mailed to attorneys.	72.
29	Filed Pltff. and Intervening Pltfs' Notice of Appeal. Mailed copy to VIA, St. Albans, Vt., Villa & Kohn, Esqs., Zander B. Rubin, Esq. (VLA), St. Johnsbury, Vt., Kathleen M. Mitchell, Esq. (VLA), Springfield, Vt., James R. Flett, Esq., (VLA) St. Albans, Vt., Richard M. Finn, Esq., Court Reporter, Judge Coffrin and Clerk, U. S. Court of Appeals for the Second Circuit.	73
t. 5	Mailed record on appeal to Clerk, U. S. Court of Appeals for the Second Circuit, New York, N. Y. Attorneys notified.	

[illegible]

CIVIL ACTION NO.

VS.

JAMES E. MALLOY,
Commissioner of Motor
Vehicles of the State
of Vermont,
Defendant

COMPLAINT

I. Introductory Statement

This is a civil rights action challenging the suspension of the right to drive any car within the State of Vermont for the sole reason that plaintiff has failed to pay a tax when he purchased two cars several years ago. Plaintiff seeks to maintain this case as a class action.

II. Jurisdiction

1. This is an action for declaratory and injunctive relief brought under the Civil Rights Act, 42 U.S.C. § 1983, and under the Fourteenth Amendment to the United States Constitution. The amount in controversy exceeds \$10,000 exclusive of the interest and costs.

2. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §§ 1343(3) and 1331(a), this suit being brought

to redress the deprivation under color of state law of rights secured by the Constitution of the United States providing for due process and equal protection of the law for all citizens.

III. Parties

3. The named plaintiff herein, Jerome J. Wells, resides and is domiciled in Milton, Vermont.

4. Pursuant to Fed. R. Civ. P. 23(a), (b)(1), (2), and (3), plaintiff sues on his own behalf and on behalf of all persons similarly situated. The class is composed of all persons in the State of Vermont who have had their license suspended for failure to pay a Vermont Motor Vehicle Purchase and Use Tax.

5. Defendant, James E. Malloy, Vermont Commissioner of Motor Vehicles is sued individually and in his official capacity. Defendant is responsible for the general operation and enforcement of the motor vehicle laws of the State of Vermont, and has collection and enforcement responsibility for the Vermont Motor Vehicle Purchase and Use Tax, as set forth in 32 V.S.A. § 8901 et seq.

IV. Claim

6. Plaintiff's right to operate a motor vehicle within the State of Vermont has been suspended solely because he has failed to pay to the State of Vermont an amount of tax due under the Vermont Motor Vehicle Purchase and Use Tax Statute, 32 V.S.A. § 8901 et seq. A copy of the Motor Vehicle Department's demand for payment and suspension notice are

attached hereto and designated Exhibit I.

7. Plaintiff does not dispute that said tax is owing in the amount alleged.

8. Plaintiff is financially unable to pay the said Purchase and Use Tax.

9. Plaintiff requires his motor vehicles driver's license to visit the doctor, shop for groceries, and for other necessities and amenities of daily life. No other members of plaintiff's family residing with him have a driver's license. Plaintiff suffers tremendous hardship, and irreparable and immediate harm from the continued suspension of his license.

10. The statutory provisions in question in effect set up two classes of motor vehicle operators: (1) those who owe a purchase and use tax, and (2) those who owe no such tax. The State of Vermont has no compelling interest in so classifying its citizens, nor is the classification reasonably related to the purpose of the motor vehicle licensing statutes. Thus the statutory provisions violate equal protection of the law.

V. Three-Judge Court

11. Plaintiff moves that a three-judge court be convened pursuant to 28 U.S.C. §§ 2281 and 2284.

VI. Relief Requested

WHEREFORE PLAINTIFF PRAYS THIS COURT:

- (1) Enter an order that this action be maintained as a class action.
- (2) Convene a three-judge district court to consider the merits of this action.
- (3) Declare 32 V.S.A. § 8909 unconstitutional.
- (4) Issue its preliminary and permanent injunction requiring the defendant to restore plaintiff's motor vehicle driver's license and the rights attendant thereto.
- (5) Consolidate the hearing on the request for a preliminary injunction with the trial on the merits.
- (6) Order such further relief as is appropriate and just.

DATED: January 24, 1973.

/s/ Roger E. Kohn
ROGER E. KOHN
Vermont Legal Aid, Inc.
192 Bank Street - Box 562
Burlington, Vermont

I have read the above complaint, and the facts therein are true to the best of my knowledge.

January 24, 1973

/s/ Jerome J. Wells
Jerome J. Wells

Signed and sworn to before me this 24th day of January, 1973.

/s/ Roger E. Kohn
Notary Public

J. E. MALLOY
COMMISSIONER
D. C. GROUT
DEPUTY COMMISSIONER



STATE OF VERMONT
DEPARTMENT OF MOTOR VEHICLES
MONTPELIER
05602

TO: Jerome J. Wells
R F D # 2
Milton, Vermont

DATE: July 28, 1972
RE: Purchase and Use Tax

PLEASE REFER
File Number: 072872 - 21D

We note in regards to Motor Vehicle Purchase & Use Tax that you have been notified of delinquent tax on the following vehicles. As of this date, we have had no reply; therefore under Title 32, Chapter 219, Section 8907, we find it necessary to assess tax and/or penalty on the book value of the vehicles at the time of the first registration by you as follows.

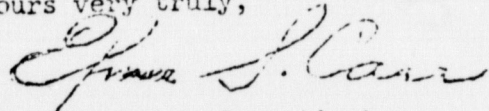
1967 Chevrolet Truck	CS137T119370	\$ 60.00
1965 Chevrolet Truck	134805B106551	69.00

Total tax and/or penalty due: \$129.00

May we remind you the above represents a partial audit of your registrations, as our files are now in the process of being updated. A more complete audit of your records will be made and if additional vehicles on which tax has not been paid are located, you will be notified in a similar manner.

In reference to the above amount, please be advised that until full payment is not received by this Department before AUGUST 3, 1972, your right to operate a motor vehicle in the State of Vermont shall be suspended and remain in effect until payment is made in full.

Yours very truly,


Elmer S. Carr, Investigator
Purchase and Use Tax Division

T 111 - A
PSC/lpd

J. E. MALLOY
Commissioner

R. E. GROUT
Deputy Commissioner



STATE OF VERMONT
DEPARTMENT OF MOTOR VEHICLES
MONTPELIER
05602

December 28, 1972
File #072872-21B
Amount \$129.00

Jerome J. Wells
R.F.D. #2
Milton, Vermont

Dear Sir or Madam:

Please be advised that the Purchase and Use Tax section has requested this division to suspend your operator's license and/or your operating privilege in the State of Vermont.

If the Purchase and Use Tax and/or penalty described in the enclosed letter is not received prior to Jan. 10/73, the suspension will be issued and will remain in effect until payment in full is received.

Return or present this letter with your payment.

Very truly yours,

L. E. Parker
Director of Driver Improvement

LP:
enclosure

STATE OF VERMONT
DEPARTMENT OF MOTOR VEHICLES, MONTPELIER, VT. 05602

SUSPENSION NOTICE

TO: WELLS, JEROME, JEAN
RFD 4
MILTON

VT 05468

BORN ON 07/01/23
IN MILTON, VT
LICENSE W054686762517-123
NO. S-04453

WHEREAS THE COMMISSIONER OF MOTOR VEHICLES HAS REASON TO BELIEVE THAT YOU
ARE AN IMPROPER PERSON TO OPERATE MOTOR VEHICLES, BECAUSE OF YOUR FAILURE
TO PAY THE PURCHASE AND USE TAX AND/OR PENALTY AS REQUIRED BY STATUTE;

IT IS ORDERED, IN ACCORDANCE WITH THE PROVISIONS OF 132, SECTION ~~XXXX~~ 8908
VSA AND AMENDMENTS, IF ANY, THAT YOUR VERMONT OPERATOR'S LICENSE AND/OR
PRIVILEGE OF OPERATING ANY MOTOR VEHICLE IN THE STATE OF VERMONT

IS HEREBY SUSPENDED EFFECTIVE JANUARY 15, 1971, THROUGH JANUARY,

TO REMAIN IN EFFECT UNTIL SUCH TIME AS YOU RECEIVE WRITTEN NOTICE, IN
WRITING, FROM THIS DEPARTMENT, OF YOUR REINSTATEMENT.

ANY VERMONT OPERATOR'S LICENSE OR LEARNER'S PERMIT NOW HELD BY YOU MUST BE
RETURNED IMMEDIATELY AFTER THIS ORDER BECOMES EFFECTIVE TO THE CLERK IN CHARGE
OF MOTOR VEHICLES, MONTPELIER, VERMONT 05602.

YOU SHALL NOT, UNDER ANY CIRCUMSTANCES, EVEN WHEN ACCOMPANIED BY A
LICENSED OPERATOR, OPERATE OR ATTEMPT TO OPERATE A MOTOR VEHICLE IN VT.
AS THIS SUSPENSION IS IN FORCE.

WITNESSED AT MONTPELIER, VT., THIS FIFTEENTH ~~XXXXXX~~ DAY OF JANUARY, 1971.
J. F. MALLOY, COMMISSIONER OF MOTOR VEHICLES

CERTIFIED MAIL

R.E. Parker

, DIRECTOR OF DRIVER IMPROVEMENT

IF YOU ARE NOW REQUIRED TO FILE FINANCIAL RESPONSIBILITY INSURANCE WITH
THIS DEPARTMENT, THIS SUSPENSION WILL EXTEND YOUR PERIOD OF FILING.

ONLY COPY AVAILABLE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JEROME J. WELLS,)	
Plaintiff)	
On his own behalf and)	
on behalf of all those)	
similarly situated,)	
)	CIVIL ACTION NO. 73-30
vs.)	
)	
JAMES E. MALLOY,)	
Commissioner of)	
Motor Vehicles of the)	
State of Vermont,)	
Defendant)	

MOTION FOR TEMPORARY RESTRAINING ORDER

Upon the verified complaint herein, plaintiff, by his attorney, respectfully moves this Court issue an Order directing defendant to restore to plaintiff his Vermont motor vehicle driver's license and the rights attendant thereto.

ALL UNTIL FURTHER ORDER OF THIS COURT.

DATED: January 24, 1973.

/s/ Roger E. Kohn

ROGER E. KOHN
Vermont Legal Aid, Inc.
192 Bank Street - Box 562
Burlington, Vermont

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JEROME J. WELLS,
Plaintiff

v.

JAMES E. MALLOY,
Commissioner of Motor
Vehicles,
Defendant

:
: CIVIL ACTION FILE NO. _____
:
:
:
:
:
:

STIPULATION

Plaintiff, by his attorney, Roger E. Kohn, and defendant, by his attorney, Kimberly B. Cheney, the Attorney General of the State of Vermont, hereby agree and stipulate as follows:

1. The plaintiff's right to operate a motor vehicle within the State of Vermont has been suspended;
2. Defendant has no objection to the entry of an order directing defendant to restore plaintiff's right to operate a motor vehicle, and the privileges attendant thereto; said order to remain in effect until further order of this Court.

January 31, 1973

/s/ Roger E. Kohn
ROGER E. KOHN
Vermont Legal Aid, Inc.
Attorney for Plaintiff
192 Bank Street - Box 562
Burlington, Vermont

January 26, 1973

KIMBERLY B. CHENEY
Attorney General

By:

/s/ Martin K. Miller
Deputy Attorney General
Attorney for Defendant
Pavilion Office Building
109 State Street
Montpelier, Vermont
Tel: 828-3171

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JEROME J. WELLS, ET AL.,)	
Plaintiff)	
)	
vs.)	CIVIL ACTION NO. 73-30
)	
JAMES E. MALLOY,)	
Commissioner of Motor)	
Vehicles of the)	
State of Vermont,)	
Defendant)	

TEMPORARY RESTRAINING ORDER

Jerome J. Wells, plaintiff in the above-entitled matter, having filed an application for a temporary restraining order, it appearing from the plaintiff's complaint, the motion for a temporary restraining order and the stipulation filed January 31, 1973 by counsel for the plaintiff and counsel for the defendant that plaintiff will suffer immediate and irreparable harm in that he will be unable to visit the doctor, shop for groceries, and obtain other necessities and amenities of daily life without substantial hardship if defendant, his agents or employees continue to withhold plaintiff's license to operate a motor vehicle in the State of Vermont in accordance with the provisions of 32 V.S.A. § 8909; and it appearing that plaintiff has demonstrated that his claim that the taking of his operator's license solely for failure to pay the Vermont Purchase and Use Tax due pursuant to 32 V.S.A. § 8901 et seq., denies him equal protection of law has a reasonable chance of probable success; and it further appearing that defendant's counsel has entered into a stipulation providing that a temporary restraining

order should issue to continue in force until a decision is reached on the merits of plaintiff's claim or to remain in effect until further order of the Court,

WHEREFORE, in accordance with the stipulation of the parties filed January 31, 1973, it is ORDERED AND ADJUDGED:

That the defendant, James E. Malloy, his agents and employees are temporarily restrained from continuing to suspend and withhold Jerome J. Wells' motor vehicle operator's license pursuant to the provisions of 32 V.S.A. § 8909.

DATED at Burlington in the District of Vermont, this 6th day of February, 1973.

/s/ Albert W. Coffrin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JEROME J. WELLS, ET AL.,)	
Plaintiff)	
)	
vs.)	CIVIL ACTION NO. 73-30
)	
JAMES E. MALLOY,)	
Commissioner of Motor)	
Vehicles of the State)	
of Vermont,)	
Defendant)	

ANSWER

Now comes the Defendant through his attorney, Richard M. Finn, Assistant Attorney General, and hereby answers the Complaint as follows:

II. Jurisdiction

The Defendant denies the allegations in paragraphs No. 1 and 2 of said Complaint and further avers that said Complaint fails to state a claim against the Defendant because no rights, privileges, or immunities within the meaning of 42 U.S.C. Sec. 1983 or 28 U.S.C. Sec. 1343 and Sec. 1331 are involved in this action and the amount in controversy does not exceed the sum of \$10,000.

III. Parties

The Defendant admits the allegations contained in paragraph No. 3 of said Complaint.

The Defendant denies the allegations contained in paragraph No. 4 of said Complaint. The Stipulation between the parties dated March 7, 1973 provides in paragraph No. 1 that the Plaintiff withdraws the class action allegations.

The Defendant admits the allegations contained in paragraph No. 5 of said Complaint insofar as they relate to the duties of the Commissioner of Motor Vehicles.

IV. Claim

The Defendant is without sufficient information to ascertain the correctness of the allegations contained in paragraphs No. 6 through No. 9, of said Complaint and therefore denies the same.

The Defendant denies the allegations contained in paragraph No. 10 of said Complaint.

V. Three-Judge Court

The Defendant objects to the convening of a three-judge court and avers that 32 V.S.A. Section 8909 is not unconstitutional.

VI. Relief Requested

The Defendant denies that the Plaintiff is entitled to the relief requested in said Complaint. ,

WHEREFORE, Defendant respectfully requests this Honorable Court to dismiss Plaintiff's Complaint as it fails to state a cause of action upon which relief can be granted.

Dated at Montpelier, County of Washington, State of Vermont, this 7th day of March, 1973.

KIMBERLY B. CHENEY
Attorney General

By: /s/ Richard M. Finn
Richard M. Finn
Assistant Attorney General

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)
)

CIVIL ACTION NO. 73-30

3. Defendant hereby stipulates that he will raise no objection to the entry of an order directing defendant to restore the right to operate a motor vehicle, and the rights attendant thereto, until further order of the Court, of any individual who had his license suspended solely for failure to pay a Vermont Motor Vehicle Purchase and Use Tax and who seeks to intervene in this action; nor will defendant oppose the intervention of such an individual.

February 27, 1973

JEROME J. WELLS

BY /s/ Roger E. Kohn
ROGER E. KOHN
VILLA & KOHN
P.O. Box 136
Hinesburg, Vermont 05461

ATTORNEYS FOR PLAINTIFF

March 7, 1973

JAMES E. MALLOY

BY /s/ Richard M. Finn
Assistant Attorney General
Office of the Attorney General
Montpelier, Vermont

ATTORNEY FOR DEFENDANT

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Jerome J. Wells, on his own	:	
behalf and on behalf of all	:	
those similarly situated	:	
	:	
and	:	
	:	
Frances Barbeau, Edward A.	:	
Sweetser, David N. O'Connell,	:	CIVIL ACTION FILE NO.73-30
Conrad Moore, Walter Holmes,	:	
Laura May Noyes, Robert Lee	:	
Booth, Shirley A. Marsha	:	
and Raymond Chester	:	
Lucas, Jr.,	:	
Intervening Plaintiffs	:	
	:	
v.	:	
	:	
James E. Malloy,	:	
Commissioner of Motor	:	
Vehicles of the State	:	
of Vermont	:	

OPINION AND ORDER

Plaintiff alleges that his right to operate a motor vehicle within the State of Vermont has been suspended solely because he has failed to pay to the State a tax due under the Vermont Motor Vehicle Purchase and Use Tax, 32 V.S.A. §§ 8901-8915 (Supp. 1973). Plaintiff does not dispute that the tax is owing in the amount demanded by the State, but claims that the statutory provisions deny him, and others similarly situated, the equal protection of the laws, in that he is financially unable to pay the Purchase and Use Tax and yet require his operator's license to obtain necessities of life. It is plaintiff's claim that the statute providing for suspension of the operator's license for failure to pay the Purchase and Use Tax, 32 V.S.A. § 8909, ^{1/} is

unconstitutional in that there is no rational relation between the statute and the legislative purpose, nor can the State show a compelling interest for suspending an operator's license when the Purchase and Use Tax is not paid.

Plaintiff claims that this Court is vested with jurisdiction by virtue of 28 U.S.C. § 1343(3)^{2/} and 28 U.S.C. § 1331(a).^{3/} He seeks to maintain this action as a class action, to have a three-judge district court convened pursuant to 28 U.S.C. §§ 2281 and 2284, and to have this Court declare 32 V.S.A. § 8909 unconstitutional. He asks the Court to issue preliminary and permanent injunctions requiring defendant to restore plaintiff's operator's license. Nine additional plaintiffs have been allowed to intervene upon the granting of their motions for leave to do. Defendant, the Vermont Commissioner of Motor Vehicles, challenges the jurisdiction of this Court to entertain the claims and has moved to dismiss for lack of subject matter jurisdiction relying on 28 U.S.C. § 1341.^{4/} A single judge may decide whether this court has the necessary jurisdiction to entertain a matter requiring a three judge panel. Ex parte Poresky, 290 U.S. 30, 31-32 (1933); Hickmann v. Wujick, 333 F. Supp. 1221 (E.D.N.Y. 1971), aff'd 488 F.2d 895 (2d Cir. 1973).

Were it not for the existence of 28 U.S.C. § 1341, it is clear that jurisdiction over the subject matter of this controversy would be conferred upon this court by virtue of 28 U.S.C. § 1343(3). However, the mandate of § 1341 is

clear--this court shall not, where a plain, speedy, and efficient remedy may be had in State Court, enjoin, suspend or restrain the assessment, levy or collection of any tax under State law.^{5/}

Our inquiry as to the effect of § 1341 consists of three questions. First, does this action involve the assessment, levy, or collection of a state tax; secondly, what is the nature of the relief that the plaintiff seeks; and finally, whether there is a plain, speedy and efficient remedy available in the Vermont Courts.

Taking up these questions in inverse order, we think it is clear that there is a plain, speedy and efficient remedy in the State courts. Plaintiff could bring an action in the County Court seeking the same declaratory and injunctive relief he seeks in this Court. 12 V.S.A. § 4711; V.R.C.P. 65; Graves v. Town of Waitsfield, 130 Vt. 292 (1972). In Graves, the Vermont Supreme Court held that injunctive relief could be granted in a declaratory judgment action. The answer to the second question is obvious from the face of the complaint and the discussion above--plaintiff is seeking a declaration that 32 V.S.A. § 8909 is unconstitutional and requests an injunction requiring defendant to restore his operator's license. If the relief requested is granted it is clear that the operation of 32 V.S.A. § 8909 will be suspended.

With regard to the question of whether this action involves the assessment, levy, or collection of a state tax,

plaintiff claims that the challenged section is not a "collection" of the tax as mentioned in § 1341, but only an aid to collection or a means of collection. Plaintiff claims that § 1341 is intended for situations where the challenge is to the tax itself or to the ~~property~~^{propriety} of its assessment. However, in our view this is a mere play on words and in fact "collection" and "enforcement" are so intertwined inextricably with one another that we would be required to draw an impossible distinction between the means and the end of the tax collection process in order to accept the plaintiff's contention in this regard. Section 8909 is found in Chapter 219 of Title 32 of the Vermont Statutes Annotated. Title 32 is entitled Taxation and Finance, Chapter 219 is entitled Motor Vehicle Purchase and Use Tax, and § 8909 is entitled Enforcement. In addition, § 8905 of Chapter 21 of Title 32 is entitled Collection.^{6/} Subsection (c) of § 8905 provides for a monetary penalty for failure to make timely payment of the tax when due. It is our belief that § 8909 cannot be isolated from the other provisions of Chapter 219 of Title 32 and the section involves the collection of the Motor Vehicle Purchase and Use Tax quite as much as the penalty provided in § 8905(c). We think it is clear that § 8909 is directly a part of the collection of the Motor Vehicle Purchase and Use Tax and even if it be characterized as a means or an aid to collection it clearly falls within the context of § 1341 which deprives this court of jurisdiction to hear this matter.

The Second Circuit said in American Commuters Association, Inc. v. Levitt, 405 F.2d -148 (1969):

[W]hen there are adequate State remedies available, § 1341 means that it so plainly says and that federal jurisdiction is still precluded by it.

405 F.2d at 1151.

The plaintiffs in American Commuters had sought to base jurisdiction of the action on 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983.

Plaintiff points out that subsequent to the decision in American Commuters, the Supreme Court decided Mitchum v. Foster, 407 U.S. 225 (1972), holding thereby that 42 U.S.C. § 1983 is within the exception of the federal anti-injunction statute, 28 U.S.C. § 2283, which provides that a federal court may not enjoin state court proceedings "except as expressly authorized by Act of Congress." We believe the Supreme Court's decision in Mitchum v. Foster is inapplicable to this motion to dismiss based on 28 U.S.C. § 1341, since § 1341 contains no exception for suits authorized by Act of Congress as does 28 U.S.C. § 2283. Indeed, § 1341 allows no exceptions of any sort where a plain, speedy and efficient remedy exists in the state courts.

Subsequent to the Supreme Court's decision in Mitchum v. Foster, the Second Circuit has held that basing a complaint for school tax relief upon an alleged violation of the Civil Rights Act or of the Federal Constitution will not avoid prohibition of 28 U.S.C. § 1341. Hickmann v. Wujick, 488 F.2d 875 (2d Cir. 1973).

Section 1341 also precludes the granting of a

declaratory judgment when the State remedy is plain, speedy and efficient. Hickmann v. Wujick, 333 F. Supp. 1221 (E.D. N.Y. 1971), aff'd 488 F.2d 875 (2d Cir. 1973); City of Houston v. Standard-Triumph Motor Co., 347 F.2d 194 (5th Cir. 1965); Wyandotte Chemicals Corp. v. City of Wyandotte, 321 F.2d 927 (6th Cir. 1963).

We are satisfied that a State court is the proper forum in which the plaintiff should seek his remedy. As stated by the Supreme Court in Matthews v. Rogers, 248 U.S. 521, 525 (1932):

Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the complaint may be brought to this Court for review if any federal question be involved⁷/

WHEREFORE, the motion of defendant Malloy is granted and the plaintiff's complaint and those of the intervenors are hereby dismissed and the Temporary Restraining Orders are hereby dissolved.

Dated at Burlington in the District of Vermont, this 1st day of July, 1974.

/s/ Albert W. Coffrin
District Judge

FOOTNOTES

- 1/ 32 V.S.A. § 8909 provides as follows:

If the tax due under subsections (a) and (b) of section 8903 of this title is not paid as herein-before provided the commissioner shall suspend such purchaser's right to operate a motor vehicle within the state of Vermont until such tax is paid, and such tax may be recovered with costs in an action brought in the name of the state on this statute.

- 2/ 28 U.S.C. § 1343(3) provides as follows:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

- 3/ 28 U.S.C. § 1331(a) provides as follows:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

- 4/ 28 U.S.C. § 1341 provides as follows:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

- 5/ Neither the judicial decisions nor § 1341 require that the state remedy be the best remedy available or even equal to or better than the remedy which might be available in the Federal Courts. Bland v. McHann. 463 F.2d 21 (5th Cir. 1972).

- 6/ 32 V.S.A. § 8905 provides as follows:

(a) Every purchaser of a motor vehicle subject to a tax under subsection (2) of section 8903 of

this title shall forward such tax form to the commissioner, together with the amount of tax due, within thirty days of the time of first registering or transferring a registration to such motor vehicle.

(b) Every person subject to a use tax under subsection (b) of section 8903 of this title shall forward such tax form and the tax due to the commissioner with the registration application or transfer, as the case may be, and fee at the time of first registering or transferring a registration to such motor vehicle as a condition precedent to registration thereof.

(c) If the tax due under subsections (2) and (b) of this section is not paid as provided, a penalty of an additional one per cent of taxable cost of \$150.00 whichever is smaller.

7/ Quoted in American Commuters Ass'n., Inc. v. Levitt,
405 F.2d 1148, 1151 (2d Cir. 1969).

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JEROME J. WELLS, ET AL.,

vs.

JAMES E. MALLOY,
COMMISSIONER OF MOTOR
VEHICLES OF THE STATE
OF VERMONT

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CIVIL ACTION FILE NO. 73-30

NOTICE OF APPEAL

Notice is hereby given that plaintiff in the above action, and all intervening plaintiffs, hereby appeal to the United States Court of Appeals for the Second Circuit from the order dismissing plaintiff's complaint and the complaints of intervenors, and dissolving the temporary restraining orders, which order was entered in this action on the 1st day of July, 1974.

Dated this 29th day of July, 1974.

/s/ Roger E. Kohn

ROGER E. KOHN
P.O. Box 136
Hinesburg, Vermont 05461
ATTORNEY FOR PLAINTIFF

/s/ William A. Dalton

Vermont Legal Aid, Inc.
ATTORNEYS FOR INTERVENING
PLAINTIFFS

